JIN LIN WOOD INDUSTRIES SDN BHD & ORS

v.

MULPHA INTERNATIONAL BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID H
[ORIGINATING SUMMONS NO: D8-24-36-2004]
13 JULY 2005

COMPANY LAW: *Arrangements and reconstructions - Meeting of creditors - Application for order that time to hold meetings be extended and for extension of restraining order - Whether necessary for scheme to be carried through - Whether extension would be unduly prejudicial to non-scheme creditors - Whether mere exclusion of a certain creditor would open the applicants to imputations of mala fides and abuse of process - Companies Act 1965, s. 176(1), (10)*

On 3 March 2004, the applicants made an *ex parte* application to allow the applicants to call for a meeting of creditors of the applicant and a meeting of the members of the applicants under s. 176(1) of the Companies Act 1965 to consider and if considered suitable to approve a proposed scheme of arrangement. The court had given order in terms of the said application and a restraining order was also given to restrain any further proceedings against the applicants. The applicants, however, could not take all the necessary actions on time, thus the applicants filed an application herein for an order that the time to hold the said meetings be extended for a further 120 days from 29 November 2004 until 28 March 2005. The applicants also applied for an extension of the restraining order under s. 176(10) of the Companies Act 1965 to a further 120 days from 29 November 2004 to 28 March 2005. The sole respondent, Mulpha International Bhd ('Mulpha'), had objected to the extension on the grounds that the restraining order was unconscionable because the proposed scheme was said to only cover a certain class of creditors whilst depriving non-scheme creditors from enforcing their legal rights against the applicants and that the proposed scheme was tainted with *mala fide* and an abuse of the process against the non-scheme creditors.

Held (order in terms of the application):

[1] The applicants were actively getting feedback from the scheme creditors in order that the scheme could be prepared and completed by taking into consideration all the views and suggestions of the scheme creditors and if need be, make amendments to the scheme before it was formally presented in the meetings. Failure to take into consideration the views to

the scheme creditors and members would result in more postponements. This would not be in the best interest of the parties. The extension was necessary in order that the scheme could be carried through. Further, the extension would not be unduly prejudicial to Mulpha or any non-scheme creditors. (p 211 d-g)

[2] The restraining order needed to be extended so that the scheme would not be defeated by the filing of legal suits. If legal suits were to get in the way, all the effort, preliminary discussions and liaising with the relevant authorities to fulfil all the legal requirements would come to naught. As far as the authorities were concerned, the Securities Commission had asked for and had obtained information regarding the restructuring. The Ministry of International Trade and Industry (MITI) had said that in principle, they had no objections to the scheme. (p 211 h)

[3] The mere exclusion of a certain creditor does not open the applicants to imputations of *mala fides* and abuse of process. Under s. 176(1), the applicants have the discretion not to compromise with all creditors and the rights of the remaining creditors are merely stayed. Further, there was no reason to worry about being left out in the cold as there were sufficient safeguards under the provisions of the Companies Act 1965, for instance ss. 176(10B), (10C), (10D), (10F) and (10G) that provide stringent penalties for violators. (p 212 b-c)

Legislation referred to:
Companies Act 1965, ss. 176(1), 176(10A)(c), (d), (10B), (10C), (10D), (10F), (10G)

For the applicants - K Ramesh (Zachary Scully with him); M/s Chong & Co
For the respondent - Govind Sreedharan (Anita Sood); M/s Chellam & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said H:
The applicants had filed an application for an order that the time to hold a Creditor's Meeting and a Meeting of Members of the applicant to consider and approve a proposal for restructuring in accordance with the order of this court dated 3 March 2004 be extended for a further 120 days from 29 November 2004 until 28 March 2005.

The applicants also applied for an extension of the restraining order under s. 176(10) of the Companies Act 1965 given by this court on 3 March 2004 to a further 120 days from 29 November 2004 to 28 March 2005. Dato' Dr. Hj. Salehudin bin Kassim was to act as a director of the applicants for the purpose of s. 176(10A)(d) of the Companies Act 1965.

I had given an order in terms of the applicants' *ex parte* application on 3 March 2004 to allow the applicants to call for a Meeting of Creditors of the applicant and a Meeting of the Members of the applicants under s. 176(1) of the Companies Act 1965 to consider and if considered suitable to approve a proposed scheme of arrangement. The meetings were to be held within 90 days from the date of the order. A restraining order was also given to restrain any further proceedings against the applicants for a period of 90 days from the date of the order.

The applicants could not take all the necessary actions on time. Hence they applied for an extension of time, which was given on 14 June 2004. The order of 14 June 2004 gave the applicants a further 180 days from 2 June 2004 to hold the meetings, until 28 November 2004. The restraining order was also extended to 28 November 2004.

As the restraining order expired on 28 November 2004 and the applicants were still not able to hold the meetings, they therefore filed this application for an extension of time of 120 days, from 29 November 2004 until 28 March 2005, in order to take all the necessary actions.

The applicants said that they were getting feedback from some of the scheme creditors in order that the scheme could be prepared and perfected. These scheme creditors had given their approval in principle. However, other scheme creditors had still not given their feedback.

The applicants also said that considering the fact that the time to hold the meetings expires on 28 November 2004 together with the requirement of 21 days notice to the creditors and members of the applicants, the applicants would not be able to hold the meetings on time.

In the meantime, the applicants said that many of the applicants' creditors had commenced legal proceedings or issued demand notice, even though they are included under the scheme. Hence the need for the restraining order to be extended.

The sole respondent, Mulpha International Bhd ("Mulpha") had objected to the extension. Its learned counsel cited Mulpha's pending appeal to the Court of Appeal against this court's decision dismissing its application to set aside the restraining order as the main reason. I have given my grounds for that decision.

Mulpha had objected to the extension on the very same grounds as in the earlier application.

To recapitulate, the grounds are firstly, that the restraining order was obtained in breach of s. 176(10A)(c) and (d) of the Companies Act 1965 ("the Act"). The said provision provides that a statement in the prescribed form as to the affairs of the applicants shall be made up to a date not more than three days before the application which is to be lodged together with the application. It provides for the nomination of a person by the majority of the creditors of the applicants to act as an independent director. This is so that the creditors are aware of the application and to avoid any abuse.

Mulpha's second ground was that the restraining order is unconscionable, *mala fide* and an abuse of the process of court. The proposed scheme was said to only cover a certain class of creditors who will benefit whilst depriving non scheme creditors from enforcing their legal rights against the applicants.

Mulpha's third ground was that the proposed scheme is tainted with *mala fide* and an abuse of process against the non scheme creditors. Mulpha claimed that only banks in which the directors have given personal guarantees were included.

I heard counsels for the applicants and respondent and decided in favour of the applicants. I gave order in terms since I am convinced that the extension will not be unduly prejudicial to Mulpha or any non scheme creditors for that matter. I am satisfied that the scheme contains sufficient particulars to be presented to creditors or the members of the applicants for their consideration.

I appreciate that the applicants are actively getting all the feedback from the scheme creditors in order that the scheme could be prepared and completed by taking into consideration all the views and suggestions of the scheme creditors and if need be, make amendments to the ccheme before it is formally presented in the meetings. Getting feedback so that at least some of them could agree in principle would ensure the smooth running of the meetings. Failure to take into consideration the views to the scheme creditors and members would result in more postponements. This would not be in the best interest of the parties. I believe the extension is necessary in order that the scheme could be carried through. I noted that a substantial number of the scheme creditors had given their agreement in principle.

I find that the restraining order needs to be extended so that the scheme would not be defeated by the filing of legal suits. If legal suits get in the way, all the effort, preliminary discussions and liaising with the relevant authorities to fulfil all the legal requirements would come to nought. As far as the authorities are concerned, the Securities Commission had asked for and had obtained information regarding the restrucjuring. The Ministry of International Trade and Industry (MITI) had on 26 July 2004 said that in principle, they had no objections to the scheme.

The applicant had shown sufficient information that they are actively pursuing the scheme and positive steps are being taken to fulfil the legal requirements of the scheme.

As for Mulpha's objections, my reasons are the same as before. The mere exclusion of a certain creditor does not open the applicants to imputations of *mala fides* and abuse of process. Under s. 176(1), the applicants have the discretion not to compromise with all creditors and the rights of the remaining creditors are merely stayed. There is no reason to worry about being left out in the cold as there are sufficient safeguards under the provisions of the Companies Act, for instance ss. 176(106), (10C), (10D), (10F) and (10G) that provide stringent penalties for violators.

I therefore hold that the extension of time for a further 120 days for the applicants to hold a creditor's meeting and a meeting of members of the applicant to consider and approve a proposal for restructuring in accordance with the order of this court dated 3 March 2004 was justified. The same goes for the extension of the restraining order.